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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 702

ALLEN BRADLEY COMPANY, et al.,

Petitioners,

v.

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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INDEX

PAGE

Jurisdiction 2

Statement of Facts 2

Assignment of Error 9

ARGUMENT:

I. The findings of fact present a combination in violation of the Federal Anti-Trust Laws 10

II. Further comments on the opinion of the Court of Appeals 25

Conclusion 28

Citations

CASES

Aikens v. Wisconsin, 195 U. S. 194 26

Allen Bradley Company, et al. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al., 41 F. Supp. 727, 51 F. Supp. 36, 145 F. (2d) 215 1-2

American Medical Association v. U. S., 317 U. S. 519 ..... 16, 20

Apex Hosiery Co. v. Leader, 310 U. S. 469 ..... 18, 19, 27

Atlanta v. Chattanooga, 127 Fed. 23 (C. C. A.); 203 U. S. 390 25

Baldwin v. Seelig, 294 U. S. 511 13

Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, 274 U. S. 37 17

Brotherhood of R. R. Trainmen v. Toledo, etc. R. R., 321 U. S. 50 25

Carolene Products Company v. U. S., 322 U. S. 119 12

J. I. Case Co. v. N. L. R. B., 321 U. S. 332 15

Clune v. U. S., 159 U. S. 590 25

Columbia River Packers Assn. v. Hinton, 315 U. S. 143 ..... 19, 21

PAGE

Coronado Coal Co. v. United Mine Workers of America (Second Coronado Case), 268 U. S. 295 18

Duplex Printing Press Co. v. Deering, 254 U. S. 443 .. 17

Edwards v. California, 314 U. S. 160 12

Folsom Engraving Company v. McNeil, 235 Mass. 269 28

Gibbons v. Ogden, 9 Wheat., 22 U. S. 1 13
Gompers v. Bucks Stove & Range Company, 221 U. S. 418 26

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229 25

James v. Marinship, California Supreme Court, Dec., 1944 15

Lawlor v. Loewe, 235 U. S. 522 17
Levering & Garrigues Co. v. Morrin, 289 U. S. 103 ... 24
Local 167 v. U. S., 291 U. S. 293 ..... 17, 18
Loewe v. Lawlor, 208 U. S. 274 ..... 13, 17
Lumber Products Association, Inc. v. United States (9 Cir.) 144 F. (2d) 546 15

Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc., 311 U. S. 91 18

National Fireproofing Co. v. Builders Association, 169 Fed. 259 (2 Cir.) 23

Steele v. L. & N. R. R. Co., 323 U. S. (Jan. 1945) 15

Terminal Warehouse Co. v. Penn. R. R. Co., 297 U. S. 500 21

U. E. R. M. W. A. v. I. B. E. W. (2 Cir.) 115 F. (2d) 488 17
United Leather Workers v. Herkert & Meisel, 265 U. S. 457 24
U. M. W. v. Coronado Coal Co., 259 U. S. 344 24
U. S. v. American Federation of Musicians, 47 F. Supp. 304, 318 U. S. 741 22-23
U. S. v. Borden Co., 308 U. S. 188 21
U. S. v. Brims, 272 U. S. 549 ..... 17, 18, 19
U. S. v. Carrozzo, 37 Fed. Supp. 191, aff'd *sub nomine* U. S. v. International Hod Carriers, etc., 313 U. S. 539 23

PAGE

U. S. v. Hutcheson, 312 U. S. 219 ..... 18, 19, 27
U. S. v. Painters Dist. Counsel No. 14, 44 F. (2d) 58, unanimously aff'd, 284 U. S. 582 17
U. S. v. Reading, 226 U. S. 324 26
U. S. v. Terminal R. R. Association, 227 U. S. 683 15

STATUTES

Clayton Act (29 U. S. C. A., Sec. 52) 14, 18, 19, 21, 23

Declaratory Judgment Act, Judicial Code, Sec. 274(d) (28 U. S. C. A., Sec. 400) 1

Fair Labor Standards Act (29 U. S. C. A., Secs. 201, et seq.) 14

Judicial Code, Sec. 240(a), as amended by Act of February 13, 1925 (28 U. S. C. A., Sec. 347) 2

National Labor Relations Act (29 U. S. C. A., Secs. 151, et seq.) 14, 17

Norris-LaGuardia Act (29 U. S. C. A., Secs. 101, et seq.) 14, 18, 19, 21, 23, 25

Sherman Anti-Trust Law (15 U. S. C. A., Secs. 1, et seq.) 1, 2, 9, 10, 11, 12, 13, 14, 16, 17, 18, 20, 21, 25, 27, 28

MISCELLANEOUS

Argument of Daniel Webster in Gibbons v. Ogden, 9 Wheat. (22 U. S. 1), at pages 11-13 13

Congressional Record, Vol. 21, page 2461 13

Constitution of the United States 11, 13

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BRIEF FOR PETITIONERS

The action was commenced in the District Court for the Southern District of New York on December 9, 1935, seeking a declaratory judgment pursuant to Section 274(d) of the Judicial Code (28 U. S. C. A., sec. 400), declaring the activities of the defendants to be a violation of the Federal anti-trust laws and asking for an injunction as further relief under said section. By stipulation the issues of law and fact were first tried before a Special Master.

The opinion of the Special Master sustained the contentions of the plaintiffs (41 F. Supp. 727, Rec., pp. 80-134). The District Court, confirming the Master's report, granted the relief prayed for (51 F. Supp. 36; Rec., pp. 155-171). The defendants appealed on the pleadings, the findings and

the judgment, and the Court of Appeals reversed and dismissed the action, Swan, J., dissenting (145 F. (2d) 215; Rec., pp. 305-329). On application of the petitioners, herein called plaintiffs, this Court, on January 2, 1945, granted certiorari.

The original record of over 25,000 pages of testimony and some 1700 exhibits, submitted to the Special Master, has been packed into 374 findings (pp. 175-286). Only a minority of them will be referred to but they constitute an amazing picture of the internal and external operations of a unique local union in a large city and its alliance with employer groups.

Jurisdiction

The jurisdiction of this Court is based on Sec. 240(a) of the Judicial Code (28 U. S. C. A., sec. 347) as amended by the Act of February 13, 1925, and the case involves the application and interpretation of the Federal anti-trust laws.

Statement of Facts

There are four commercial groups involved in the trade picture:

1. *Plaintiffs* are manufacturers of electrical equipment, which seek to market their products in New York City for installation and use in New York City buildings (Findings, 1 to 84, pp. 175-194). Generally speaking, their factories are outside of New York State and outside of the territorial jurisdiction of defendant Local 3 (Findings, 85, p. 195; 96, p. 198; 346, pp. 276-8), so that they cannot deal with Local 3 in respect to labor relations (Findings, 85, p. 195; 96, p. 198). The largest of them have collective bargaining agreements with other unions (Findings, 4, 20, 32, 38, 60, 68, 71, 73, pp. 175-191).

2. *Defendant, Local Union No. 3,* with jurisdiction limited to New York City and vicinity, has a membership of some 15,000, comprised largely of (a) employees of union electrical contractors, who install electrical equipment in buildings, and (b) employees of local manufacturers, who produce electrical equipment for buildings (Findings, 86-139, pp. 195-208).

Local 3 is a closed union and the right to become a member through apprenticeship is entailed for sons and brothers of existing members (C. C. A. opinion, p. 308, Finding, 125, pp. 205-6). It is highly autocratic in its government (Findings, 106-124, pp. 200-5) and ruthless in its operations (Findings, 198-227, pp. 228-39). Its membership "covers virtually everyone working on or producing electrical equipment in any way within the area" (C. C. A. opinion, p. 308, Finding, 95, p. 198) and dominates the "entire industry" (C. C. A. opinion, p. 311).

3. *Local Union Electrical Manufacturers,* competitors of plaintiffs for the New York City market, operate in New York City under closed shop agreements with Local 3. They are co-conspirators but not defendants. These manufacturers—or at least some of them—unionized upon condition that Local 3, through its control of installation work, would "deliver" the New York market to them and prevent outside competition (Findings, 168-172, pp. 217-20). (See also Findings, 184-7, 257, 265, 300-2, 314, 349-61, 364-6.)

4. *Union Electrical Contractors,* herein called "contractors," operate under closed shop agreements with Local 3 and purchase and install electrical equipment in New York City. They are co-conspirators but not defendants. Local No. 3 permits no other electrical contractors to do substantial work in New York City (Findings, 188-227, pp. 225-39), and by written agreement be-

tween Local 3 and this privileged group of contractors no one but these contractors is permitted to purchase the electrical equipment upon which members of Local 3 will work (Findings, 260-2, pp. 249-50). Local 3 completely dominates and controls these contractors (Findings, 217, 222-7, pp. 235-39). Local 3 also determines which contractors may operate as union contractors (Findings, 219-26, pp. 235-9) "by refusing to admit certain additional contractors within the group where it would result in competition with those already in it" (Finding, 219, p. 236). Again, there is a closed ring.

The Trade affected is the sale by the plaintiffs to the contractors in New York City of lighting fixtures, low tension switchboards, signalling equipment, panel boxes, control equipment, switches (other than toggle), high tension cables, armored BX cable, wire, outlet boxes, branch circuits and feeders (Findings, 345, p. 276, 228-30, pp. 239-40), herein called "electrical equipment." The annual volume of purchases of such articles by said contractors is about $10,000,000 (Finding, 229, pp. 239-40).

The Means employed to destroy plaintiffs' commerce is a boycott made effective through the monopolistic control maintained by Local 3 and the contractors over the purchase and installation of electrical equipment in New York City. This boycott is carried on by Local 3 in combination with the contractors—the purchasers and installers of said products—and local manufacturers, producers of such products (Finding, 346, pp. 276-7). All electrical equipment is required to be manufactured, purchased and handled and finally installed by members of this tripartite alliance. Adherence to these restrictions is secured through the mixed inducements of commercial rewards and punishments or the possibility thereof (Findings, 346, 353, 356, 358, 181, 230, 245, 257, 300, 302, 333-41, 154, 219-20).

Summarizing this situation, the Court of Appeals said (p. 311):

> "All in all, the situation disclosed by the findings is that of an entire industry in a local area, quite dominated and closed to outsiders by a powerful union, whose members receive as a result exceedingly higher wages, shorter working hours, and improved working conditions, and whose copartners—the local manufacturers and contractors—also gain by the greater profits achieved through the stifling of competition." (See also, Finding 95, p. 198).

No one but conspiring contractors are "able to buy" and they dare not buy "on a competitive basis" (Finding, 354, p. 280).

Price control was a major purpose:

> "The combination and conspiracy hereinbefore described was intended to and did give the local union manufacturers power to control the market price of their products as a result of their monopoly and was intended to and did give the union contractors exclusive purchasing rights to all electrical equipment for installation and contracts involving larger sums of money wherewith to add to their profits." (Finding, 353, p. 279).

While it appears that the contractors dare not resist the union, it also is found as a fact that they actively and affirmatively participated in the boycott for their profit (Findings, 333-41, pp. 272-5). "Like the manufacturers, the contractors were not averse to the extra expense of union material and labor, when all competition was thus removed from the field" (C. C. A. opinion, pp. 309-10).

A written agreement, executed in March, 1935, to settle a building trades strike during the construction of Rockefeller Center in New York City, enlisted others than the electrical industry in the boycott. The parties were Local 3, The New York Electrical Contractors Association, As-

sociation of Contracting Plumbers of the City of New York, and Heating, Piping and Air-Conditioning Contractors, N. Y. C. Assn., Inc., and Sprinkler Contractors, and the agreement prescribed that certain electrical control equipment—of a type which did not interest the local manufacturers—should not be bought as completed articles but should be assembled and wired by the union contractor on the job. This agreement prevented interstate commerce in the finished product and transferred the business of building this equipment from the plaintiffs' factories in other states to the contractors on the job site (Findings, 275-291, pp. 254-60). It trebled the cost (Findings, 291-93, p. 260), and impaired efficiency, economy and fire insurance protection (Findings, 291-307, pp. 260-5). In two large jobs, the extra costs of disassembling and unwiring and reassembling and rewiring to meet this requirement were respectively $17,500 and $5,800 (Finding, 293, p. 260).

The findings show in detail the extent to which interstate commerce has been restrained and destroyed and prices increased in respect to lighting fixtures (Findings, 231-57, pp. 240-49), switchboards (Findings, 168-87, pp. 217-25), switches (Findings, 263-66, pp. 250-1), control equipment (Findings, 267-307, pp. 252-65), signalling apparatus (Findings, 308-14, pp. 265-7), wire and cable (Findings, 315-20, pp. 267-8), and other lines of equipment (Findings, 321-8, pp. 268-70). By reason thereof, the cost of wiring and assembling lighting fixtures has increased four to eight times (Finding, 251, p. 246) and the prices of other products are materially higher than competing products (Finding, 351, p. 279).

For illustration, the Westinghouse Electric & Manufacturing Company bid $56,000 for the panel boards and switchboards to be installed in the Ten Eyck Low Cost Housing project but was informed "it could not have the job at any price, because the product did not bear the

union label," and the order went to a local union manufacturer for $110,934 (Finding, 183, p. 223). Unlabelled products "cannot be sold at any practical price" (Finding, 187, p. 225). There is nothing in the findings to suggest that the increased prices obtainable through the monopoly were to bear any relation to labor costs.

The control of the market was masterly. As each branch of the industry was enveloped, the entire course of trade was forthwith transferred from its normal channels to the monopolists. During changing periods an inventory was taken of goods held by the contractors and a deadline fixed so that non-union goods purchased in the pre-boycott era for that particular article might be accepted (Finding, 333, p. 272). Special dispensations were granted when it suited the purposes of the combination (Findings, 343-4, pp. 275-6; see also, Findings, 330-1, p. 271). Unknown ways for placing union labels on non-union goods were practiced (Finding, 313, p. 266). The market could be parcelled out like a piece of cheese and the opportunities for graft and corruption were unlimited.

Several findings deal specifically with the increased prices imposed on the public:

> "Some union manufacturers of outlet boxes and switches located in New York City, and working under agreement with Local No. 3, issued from time to time two different price lists for the same products, one containing prices for their products without the union label—for the solicitation of business in unprotected areas where free and open competition must be met, and another containing a price list on a different colored sheet, covering the same products, made by the same employees in the same factory, with the union label, for the solicitation of business in the protected area in New York City and the Metropolitan area, and in some instances, the prices for the protected area have been more than double the prices charged for the same items in the unprotected area" (Finding, 349, p. 278—see also, Findings, 266, p. 251; 351-2, p. 279).

In one case, a meter pan was priced at $2.40 without the union label and $5.40 with the label, the premium for the label being more than the normal price of the product (Finding, 350, p. 278).

Here again, as already stated, there is nothing to show any relation between labor costs and the increased prices.

The conscious activity of Local 3 in securing higher prices for its employers is shown by its official representation at one time on the Committee which administered a price-fixing code (Findings, 156-67, pp. 213-7). "The participation of Local 3 in the formation and policing of the Code as aforesaid was one of the means by which Local 3 obtained the cooperation and aid of the union electrical contractors in the boycotting * * *" (Finding, 165, pp. 216-17). In the case of lighting fixtures, the union even "caused to be established" the manufacturers who were to be the boycott beneficiaries (Finding, 235, pp. 241-2).

The boycott is contrary to union philosophy and objectives and contrary to the policy of the I. B. E. W., the parent union which charters the Locals, in that it bans all outside goods, including union goods made by members of other local electrical unions chartered by the I. B. E. W. (Finding, 179, p. 222; Finding, 246, p. 245; Finding, 250, p. 246; Finding, 326A, p. 270; Finding, 359, pp. 281-2; Finding, 366, p. 284). When a factory in Northern New Jersey, where Local 3 had limited jurisdiction, had a contract with Local 3, its products were accepted but when with the approval of the I. B. E. W. it contracted with Local 52 I. B. E. W., its products were rejected (Finding, 326A, p. 270). When the local contractors and Local 3 received from the I. B. E. W. a list of manufacturers to be patronized—which meant a blacklist of all others (Finding, 338, p. 274)—they pruned it of the outside manufacturers who were working under union agreements approved by the I. B. E. W., so that, as revised, it contained only the names of those having contracts with Local 3 (Finding,

341, p. 274). The outside manufacturers approved by the I. B. E. W. were thereby blacklisted. The combination therefore goes beyond those objectives generally approved by organized labor and gives locality protection to these three groups contrary to the purposes of the parent union and contrary to the normal program of the union movement.

The union is not in dispute with any employer because he refuses to conform to union demands. It acts in perfect collusion with the local contractors and local manufacturers and has no quarrel with the plaintiffs. The ban on plaintiffs' products is an absolute ban and there is nothing plaintiffs can do to avoid it (Findings, 360-1, p. 282). It is like a strike against the employment of a man because he does not belong to a union and at the same time arbitrarily denying him union membership. It is the difference between regulation and prohibition. The plaintiffs are unobjectionable in the union world. They might be the most approved of all employers by the I. B. E. W. and they might maintain standards which Local 3 was aspiring to reach in New York City, but all this would not save them. The defendants are not seeking to bring about any change in employment conditions in plaintiffs' factories (Findings, 360-1, pp. 282-3; Findings, 368-9, p. 285). The subject matter of the suit does not involve or grow out of a labor dispute (Findings, 363, 367-9, pp. 283-5).

This combination, which is continuing, has caused, and threatens further to cause, the plaintiffs irreparable damage and injury (Findings, 347-8, p. 278).

Assignment of Error

The error urged is the failure of the Court of Appeals to hold that the combination established by the findings violates the Sherman Anti-Trust Law, 15 U. S. C. A., sec. 1, et seq. and laws amendatory thereof, and should be enjoined.

I

The findings of fact present a combination in violation of the Federal Anti-Trust laws.

Local 3 and the employers in the electrical industry, together with contractors for plumbing, air-conditioning and sprinkling equipment, have pooled their economic power to bar interstate competition in electrical equipment and thus monopolize the New York City market. This is accomplished by requiring all purchasing and installation of electrical equipment to be done exclusively by the conspiring contractors and all production to be done by the conspiring manufacturers—or if they do not produce the particular equipment in question—by having it built by the conspiring contractors on the job; and by requiring that all manual work performed in the production and installation of electrical equipment shall be done by members of Local 3. The sole objection to the non-area products which are thus embargoed is that they would infringe on the monopoly and the income of the conspirators.

The Court of Appeals finds this combination to be legal because one group of the tripartite alliance is actuated by a motive or intent to "make work" for journeymen members. The conclusion appears to be that manufacturers, contractors, dealers and employees within a local industry may lawfully unite their economic power to secure a local monopoly if the conspirators include a labor group seeking to increase their employment opportunities. Thus the cotton mills and the textile workers of the North may unite to eliminate the competition of Southern cotton mills, and the shipbuilding yards and airplane factories on the Pacific Coast, through restraints of trade otherwise unlawful, may unite artificially to protect the continuance of that industry on the Pacific Coast and—as in this case—city markets may be preempted as private pre-

serves with the union acting as policemen to punish poachers.

1. We submit there are fundamental social, political and legal reasons which should lead this Court to rule that Congress never intended to remove such combinations from the prohibitions of the anti-trust laws.

One of the major purposes of our national existence, for which the Constitution was adopted, is the maintenance of a national economy free from trade barriers, and no attempt to destroy unqualifiedly that national area of free trade should escape condemnation.

The avowed purpose of this monopoly being sectional and territorial in character—and having no relation to labor standards or class alignment—is an undisguised attempt, within its scope, to relegate the New York City market to a condition of economic isolation.

While mankind strives to raze trade barriers as between nations, and thus to enlarge the area of free trade in the cause of human betterment, these monopolists erect barriers within the very confines of the nation and thus seek the disintegration of our national economy.

If a group of citizens in New York City may bar the entry of union-made equipment coming from Philadelphia, St. Louis, Detroit or Chicago, these offended cities will retaliate in self-defense and the nation will be Balkanized and thrust back into a state of economic chaos such as prevailed when colonies erected protection barriers against inter-colonial trade.

Where the discrimination or restraint is based on the extraterritorial origin of the goods and not upon terms or conditions of employment, it is against any conceivable public interest to contend that a Constitutional purpose, essential to our existence as a nation, must be discarded for the benefit of a group of producers, contrac-

tors, dealers and workers in a single city. If competition, as a regulator of trade in the public interest, is to be so easily destroyed, the need for public regulation and the end of our free economy will be inevitable.

As a result of the Court of Appeals decision in this case, real estate agents are already soliciting outside industries to locate within the New York City area, on the ground that only by so doing may they enjoy the protected metropolitan market. Such a perverted trend, artificially imposed, promotes undesirable congestion in large cities and taxes the public by increasing living costs.

2. Since neither city, state nor Federal government has the power by legislation to authorize the creation of such trade barriers or the allocation of territorial markets, no court should read into the Federal Anti-Trust Act a sanction for private persons so to do. While Congress can prohibit the transportation of articles in interstate commerce in the reasonable exercise of police power, it seems clear that it may not do so for the sole purpose of giving a group of citizens in a particular state protection from the competition of citizens in another state. Cf. *Carolene Products Company* v. *U. S.*, 322 U. S. 119.

Every free person in the United States has a basic right to move from state to state (*Edwards* v. *California*, 314 U. S. 160) and to ship merchandise from state to state, and the public is entitled to enjoy the benefits which flow from the exercise of this right. To withdraw this right for the sole purpose of giving persons in some locality the equivalent of a tariff or embargo protection would conflict with the inherent purpose for which the right was created.

3. The grant of power to Congress to regulate interstate commerce in the interest of national unity, and the many Federal statutes enacted to secure freedom of interstate commerce and the "liberty of the trader to engage

therein,"* could hardly be invoked to correct a scheme more clearly repugnant to them and more clearly in conflict with the national policy they are designed to safeguard.

Senator Sherman, in sponsoring the passage of the Sherman Anti-Trust Act, referred to the lack of economic unity prevailing in this country before the Constitution delegated to Congress the power to regulate interstate and foreign commerce. The Senator said:

> "The want of this power was one of the leading defects of the Confederation, and probably as much as any one cause conduced to the establishment of a Constitution. It is a power vital to the prosperity of the Union, and without it the Government could scarcely deserve the name of a National Government and would soon sink into discredit and imbecility. It would stand as a mere shadow of sovereignty to mock our hopes and involve us in a common ruin." (21 Cong. Rec., 2461.)

In adopting the Federal Constitution, no factor was more preeminent in the minds of the statesmen in 1787 than the necessity for establishing the free flow of interstate commerce, and protecting it against state barriers.

See

Argument of Daniel Webster in *Gibbons* v. *Ogden*, 9 Wheat. (22 U. S. 1 at pages 11 to 13) and concurring *Opinion of Justice Johnson*, at pages 223 to 226;
Baldwin v. *Seelig*, 294 U. S. 511.

4. Nor is there anything in the trend of modern legislation or public policy to exempt the combination involved in the case at bar. It does not involve the employer-employee relationship. It is an economic war between production units of employers and employees in one area, and like production units in other states. It is a dispute over the terms and conditions of selling and buying elec-

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* *Loewe* v. *Lawlor*, 208 U. S. 274.

trical equipment and not a dispute over terms and conditions of employment. It is a device to market articles already produced, by boycotting competing articles without regard to the labor standards under which they have been produced. It is unrelated to class conflict.

The social or political philosophy underlying special legislation for the benefit of labor has no application to competitive relationships between groups of competing producers. The National Labor Relations Act protects employees as against employers. The Fair Labor Standards Act fixes minimum standards for employees below the supervisory level. The Clayton Act and the Norris-LaGuardia Act enlarge the area of freedom of collective action by employees where there is a labor dispute over terms and conditions of employment. Other illustrations can be given. None of them sanctions or encourages sectionalism. They deal with rivalries or conflicts between classes and not rivalries between localities. They concern horizontal and not vertical cleavages or segments of society. Congress has been interested in helping labor in its efforts to secure protection against injustices but by the terms of the anti-trust acts it has opposed protected markets as between states or as between competing production units where labor standards are not in issue. The concept of domestic free trade still dominates our anti-trust policy and is not qualified by our labor policy of aiding collective bargaining.

5. The essence of this conspiracy is not merely restraint of trade but monopoly by a closed ring. New contractors cannot enter the ring. Journeymen, barred under closed shop restrictions, cannot enter the trade, unless they are sons or brothers of those who have already been admitted, and no products can enter from the outside on any terms or conditions. It is the difference between regulation and prohibition, as recognized in the exercise of police power, and organized labor in "legislating" police regulations for

an industry (*J. I. Case Co. v. N, L. R. B.*, 321 U. S. 332) should recognize that distinction. It is one thing to outlaw the scab but it is quite a different thing to deny him redemption. The double barrier becomes an attack on fundamental rights and ceases to be an instrument of social or industrial reform, which gives rise to a labor dispute. Closed shop unionism is impressed with a public interest and must take on new restraints (*Cf. Steele* v. *L. & N. R. R. Co.*, 323 U. S.; *James* v. *Marinship*, California Supreme Court, Dec. 1944). The combination, having monopolized the services of purchasing and installing said equipment within the community, is impressed with a duty not to bar outside goods. (Cf. *U. S.* v. *Terminal R. R. Association*, 227 U. S. 683.) Possibly such a combination might raise the level of employment conditions by discrimination against the nonconformist, but it may not arbitrarily discriminate against the colored race or against those who live and produce in a sister state.

It is conceded that the combination, whether examined from the viewpoint of the conspiring union, the conspiring manufacturers or the conspiring contractors, was to increase the income of all three groups of allies by preventing contractors or manufacturers outside of the local ring from sharing the market. There is solidarity of interest in every detail. The gain of the non-labor member is the gain of the labor member. As stated in *Lumber Products Association, Inc.* v. *United States*, 9 Cir., 144 F. (2d) 546, "They split the take," one in wages and the other in profits. Through this control of the distribution of orders or contracts for their employers, the union members avoid sharing work opportunities with non-area journeymen, just as the employers avoid sharing market opportunities with non-area employers. This is not a combination to protect labor from low-wage goods, machine-made goods, non-union goods, or the goods of a rival union. It is a combination to exclude all non-area goods without regard to the level of wages, the terms of employment,

low labor costs due to improved machinery or technological progress, or any legitimate concern of labor. The union does not resist unfair competition but resists all non-area competition.

The benefits sought grow out of an attempt to alter the relation between producer and consumer and not out of an attempt to alter any relation between employer and employee. No benefit flows to any of the three groups of the conspirators except through monopolizing the market for the sale of manufactured articles. The restraint of commerce is not an incident of any legitimate purpose. In defending themselves the defendants merely assert that by reason of this restraint of trade and monopoly they can increase their income.

6. The union movement itself never sought to exempt such combinations when it was seeking Congressional relief and advocating the legislation which the Court is now called upon to interpret. The reports of Congressional committees and the literature of the day prove this. The combination is unorthodox according to union philosophy when it fails even to recognize the legitimacy of products made by any local union chartered by the same parent union. Local 3 and the I. B. E. W. were at loggerheads over this very point (Finding, 341, p. 274).

7. In this case a labor union—which is the exempted group under our anti-trust laws—unites with employers who are the non-exempted group. Does the exemption extended to labor whitewash the non-labor group or does the taint imposed on a non-labor group extend to the labor group? Surely all those engaged in such a common enterprise must have the same legal standing regardless of their station in life (Cf. *American Medical Association* v. *U. S.*, 317 U. S. 519), for otherwise equality before the law is lost and the fundamental principles of conspiracy law, visiting equal blame on all, are overthrown. A conspirator's liability for what is done or said by other con-

spirators is not qualified by the degree or nature of his participation or the character or extent of the benefits he hopes to derive. Such whitewashing of employer-employee combinations as is here sought would undermine our anti-trust and anti-monopoly laws by making it possible for collusive groups of employers and unions to pool their economic power for the purpose of restraining competition and milking the public.

8. Congress has frequently exercised its control over interstate commerce for the purpose of aiding enforcement of both Federal and state laws. It is not to be presumed, therefore, that Congress has so exercised its control as to deprive people of their rights under another Federal act. To say that products made under union relationships required by the National Labor Relations Act shall not flow in interstate commerce,—because not made under different union relationships impossible of attainment,—deprives the journeymen who produce the banned products of their rights under the National Labor Relations Act (see *U. E. R. M. W. A.* v. *I. B. E. W.*, 2 Cir., 115 F. [2d] 488), as well as their Federal rights to produce for interstate commerce.

9. Except for the so-called "labor exemptions" there can be no doubt that the combination violates the anti-trust laws.* We therefore attack this problem of defining such exemptions by dealing chronologically with the crucial decisions of this Court.

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* *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Association*, 274 U. S. 37;
U. S. v. *Painters Dist. Counsel #14*, 44 Fed. (2d) 58, unanimously affirmed, 284 U. S. 582;
U. S. v. *Brims*, 272 U. S. 549 (unanimous decision);
Local 167 v. *U. S.*, 291 U. S. 293 (unanimous decision);
Duplex Printing Press Co. v. *Deering*, 254 U. S. 443;
Loewe v. *Lawlor*, 208 U. S. 274 (unanimous decision);
Lawlor v. *Loewe*, 235 U. S. 522 (unanimous decision).

In *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, this Court, relying in part on *U. S.* v. *Brims*, 272 U. S. 549; *Local 167* v. *U. S.*, 291 U. S. 293, and *Second Coronado* case, 268 U. S. 295, held that the anti-trust laws apply to labor where the activities are "shown to have any actual or intended effect on price or price competition", or where there is "the plain design of suppressing or narrowing the interstate market" or "suppression of competition in the market by methods which were deemed analogous to those found in the non-labor cases." As the offense involved is purely an economic one and it is the forbidden result rather than the means of accomplishment which is of chief concern, it is immaterial, according to the *Apex* decision, whether the means employed are moral or unmoral, legal or illegal.

In *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, the same principle was further developed in a discussion as to whether the case involved a labor dispute or an interference with commerce. Plaintiffs lost on the finding of fact that the so-called "Vendors" attacked by the boycott were not entrepreneurs but an organizable labor group competing with members of the defendant union and that therefore the entire controversy constituted a "labor dispute." The emphasis placed in the opinion on this factual distinction confirms the doctrine already developed by this Court, which confined the labor exemptions to matters relating to the employer-employee relationship.

In *U. S.* v. *Hutcheson*, 312 U. S. 219, a divided Court dealt with the Sherman Act, the Clayton Act and the Norris-LaGuardia Act as "three interlacing statutes" and reinterpreted the Clayton Act of 1914, in the light of the Norris-LaGuardia Act of 1932. It held that the labor exemptions under the anti-trust laws were identical for the purposes of injunctions, damages or criminal prosecutions (p. 234) and therefore made pertinent to this injunction case all decisions dealing with the substantive law on this

subject, regardless of whether they are or are not injunction cases. In dealing with the substantive law the Court said (p. 232):

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

The Court held the boycott involved in that case constituted "lawful conduct under the Clayton Act unless the defendants cannot invoke that Act because outsiders to the immediate dispute also shared in the conduct." The meaning of the words "non-labor groups" is further illuminated by the Court's reference to *United States* v. *Brims* (*supra*), which has been reaffirmed by the United States Supreme Court in the *Apex* and *Hutcheson* cases.

These decisions give the background for the decision in *Columbia River Packers Assn.* v. *Hinton*, 315 U. S. 143, an injunction suit, relied upon by the District Judge in the instant case, where the Court in construing the Norris-LaGuardia Act, said, page 145:

> "• • • the attention of Congress was focussed upon disputes affecting the employer-employee relationship. and that the Act was not intended to have application to disputes over the sale of commodities."

And at page 146:

> "But the statutory classification, however broad, of parties and circumstances to which a "labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing. Our decision in *New Negro Alliance* v. *Grocery Co.*, 303 U. S. 552, and *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91, give no support to the re-

spondents' contrary contention, for in both cases the employer-employee relationship was the matrix of the controversy.

"* * * That some of the fishermen have a small number of employees of their own, who are also members of the Union, does not alter the situation. For, the dispute here, relating solely to the sale of fish, does not place in controversy the wages or hours, or other terms and conditions of employment, of these employees."

The case of *American Medical Association* v. *U. S., supra,* involved an indictment of medical associations and practicing physicians under the anti-trust laws. The Court first sustained the lower court in saying: "The fact that defendants are physicians and medical organizations is of no significance, for Sec. 3 prohibits 'any person' from imposing the proscribed restraint." The Court then proceeded, pages 533-4:

"Section 20 of the Clayton Act, as expanded by Section 13 of the Norris-LaGuardia Act, is the only legislation which can have any bearing on the case."

* * * * * * * * * *

"(p. 536) * * * These independent physicians, and the two petitioning associations which represent them, were interested solely in preventing the operation of a business conducted in corporate form by Group Health. In this aspect the case is very like *Columbia River Packers Assn.* v. *Hinton,* 315 U. S. 143. What was there decided requires a holding that the petitioners' activities were not exempted by the Clayton and the Norris-LaGuardia Acts from the operation of the Sherman Act."

This language applies here specifically. These defendants "were interested solely in preventing the operation of a business conducted in corporate form * * *." They were not interested in the labor conditions of that business.

10. As already stated, the original Anti-Trust Act and the supplementary acts of 1914 and 1932 are "interlacing" acts to be reconciled by defining the limits of the labor exemptions. Since the offense charged goes beyond the purpose of the labor exemptions, the prohibitions of the original act are still applicable.

U. S. v. *Borden Co.*, 308 U. S. 188;
Terminal Warehouse Co. v. *Penn. R. R. Co.*, 297 U. S. 500.

The suppression of competition without regard to labor standards and with intended price increases,—whether or not in cooperation with non-labor groups,—is not within the labor exemptions of the anti-trust laws. It is a non-labor issue. The joinder with non-labor groups is merely one of the persuasive pieces of evidence that labor has gone beyond its exemptions. Whether there is any such joinder seems immaterial if the dispute does not concern the "employer-employee relationship" and is in fact a dispute "over the sale of commodities" (*Columbia River Packers* case, *supra*), without regard to the labor standards under which they are produced. In fact, it would seem to be immaterial, except on the question of probative weight, whether the combination was employer-inspired or employee-inspired. The test is whether labor has stepped "off the reservation" and entered the field of merchandising control, without regard to working conditions.

11. Among the numerous cases* dealing with related situations, some definitely support, but none contravenes, our

* *United Electrical Coal Cos.* v. *Rice*, 80 F. 2d. 1 (7 Cir.) cert. denied 297 U. S. 714; *Hill* v. *U. S.*, 84 F. 2d. 17 (3 Cir.) reversed on other grounds 300 U. S. 105; *Scavengers Service Corp.* v. *Courtney*, 85 F. 2d. 825 (7 Cir.); *Russell* v. *U. S.*, 86 F. 2d. 389 (8 Cir.); *Blankenship* v. *Kurfman*, 96 F. 2d. 450 (7 Cir.); *Union Premier*

(*Footnote continued on next page*)

contentions. We discuss only the two upon which the Circuit Court relied.

In the case of *U. S.* v. *American Federation of Musicians*, 47 Fed. Supp. 304, aff'd 318 U. S. 741, there was a strike against a producer of records and supplementary action, all for the purpose of preventing the manufacture of musical records and electrical transcriptions, which by their use supplanted the services of live musicians. All activities

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Food Stores v. *Retail Food Clerks, etc.*, 98 F. 2d. 821; 101 F. 2d. 475 (3 Cir.) Remanded to D. C. to dismiss complaint as moot, 308 U. S. 526; *Fur Workers Union Local 72* v. *Fur Workers Union*, 105 F. 2d. 1 (U. S. C. A., Dist. of Col.) affd. 308 U. S. 522; *Converse* v. *Highway Const. Co.*, 107 F. 2d. 127 (6 Cir.); *U. S.* v. *Gold*, 115 F. 2d. 236 (2 Cir.); *Int. Assn. of Bridge, Structural etc. Workers* v. *Pauly Jail Bldg. Co.*, 118 F. 2d. 615 (8 Cir.) cert denied, 314 U. S. 639; *Gundersheimer's* v. *Bakery & Confectionery Workers*, 119 F. 2d. 205 (U. S. C. A. Dist. of Col.); *Albrecht* v. *Kinsella*, 119 F. 2d. 1003 (7 Cir.); *Lee Way Motor Freight Inc.* v. *Keystone etc.*, 126 F. 2d. 931 (10 Cir.) cert. denied 317 U. S. 645; *Truck Drivers' Local* v. *U. S.*, 128 F. 2d. 227 (8 Cir.); *Hinton* v. *Columbia River Packers Assn.*, 131 F. 2d. 88 (9 Cir.); *Carter* v. *Herrin Motor Freight etc.*, 131 F. 2d. 557 (5 Cir.); *Western Union Tel. Co.* v. *I. B. E. W.*, 133 F. 2d. 955 (7 Cir.); *Brown* v. *Coumanis*, 135 F. 2d. 163 (5 Cir.); *U. S.* v. *Local Union #3*, 42 F. Supp. 783 (S. D. N. Y.); *U. S.* v. *N. Y. Electrical Contractors Assn.*, 42 F. Supp. 789 (S. D. N. Y.); *Diamond etc.* v. *Leader*, 20 F. Supp. 467; appeal dismissed 99 Fed. 2d. 1001; *Fehr Baking Co.* v. *Bakers' Union*, 20 F. Supp. 691; *Donnelly Garment Co.* v. *I. L. G. W. U.*, 20 F. Supp. 767; 21 F. Supp. 807; 304 U. S. 243; 23 F. Supp. 998, 99 Fed. 2d. 309 (8 Cir.) cert. den. 305 U. S. 662; 119 Fed. 2d. 892 (8 Cir.), 55 F. Supp. 572; *Oberman & Co.* v. *U. G. W.*, 21 F. Supp. 20; *Houston & North Texas etc.* v. *Local Union #886*, 24 F. Supp. 619; *U. S.* v. *Drivers, Chauffeurs and Helpers Union*, 32 F. Supp. 594; *In Re Local Union No. 550*, 33 F. Supp. 544; *Consolidated Terminal* v. *Drivers Union*, 33 F. Supp. 645; *U. S.* v. *Heating, Piping & Air Conditioning Contractors*, 33 F. Supp. 978; *U. S.* v. *Lumber Institute etc.*, 35 F. Supp. 191; *Keystone Freight Lines etc.* v. *Pratt etc.*, 37 F. Supp 635; *U. S.* v. *Associated Plumbing etc.*, 38 F. Supp. 769; *U. S.* v. *Goedde*, 40 F. Supp. 523; *U. S.* v. *Central Supply Ass'n.*, 40 F. Supp. 964; *Manaka* v. *Monterey etc.*, 41 F. Supp. 531; *Hunt* v. *Crumboch*, 44 F. Supp. 796, 143 F. 2d. 902; *Loew's* v. *Basson*, 46 F. Supp. 66 (S. D. N. Y.); *Hunt* v. *Brotherhood etc.*, 47 F. Supp. 571; *U. S.* v. *Bay Area etc.*, 49 F. Supp. 733; *Lumber Products Assn., Inc.* v. *U. S.*, 144 Fed. (2d) 546; *U. S.* v. *San Francisco Electrical Contractors Assn.*, 57 F. Supp. 57.

centered on this issue and the purpose was to create work opportunities for members of the defendant union. The lower Court, in dismissing the complaint, said (47 Fed. Supp. 309):

> "Here the employees seek only a contract with their employers for a 'closed shop' (in a sense large enough to include a shop which excludes not only non-union workers but also machines) and they seek this contract primarily for their (the servants') benefit and not for the benefit of a non-labor group."

The means employed was merely a refusal by defendants to produce articles which would reduce employment of musicians by eliminating part of their jobs. There was no question of restraining the competition of rival lines of merchandise.

A like situation confronted the Court in *U. S.* v. *Carrozzo*, 37 Fed. Supp. 191, aff'd *sub nomine; U. S.* v. *International Hod Carriers, etc.*, 313 U. S. 539, where defendant hod carriers struck against building construction to prevent the use of concrete mixers, which displaced their labor. In that case the Court below said (at p. 196), "In the instant case no acts are alleged to have been performed which would constitute restraint of trade in commercial competition in the marketing of truck mixers." It was merely a "jurisdictional dispute."

In both of these cases the defendants in effect said: "Give us all of this kind of work or we will take none of it"; a form of combination which was legal long before the passage of the Clayton Act or the Norris-LaGuardia Act. *National Fireproofing Co.* v. *Builders Association*, 169 Fed. 259 (2nd Cir.). In both the musicians and hod carriers cases exclusive employment was sought in local enterprises and there was no direct purposeful restraint of interstate commerce—merely a dispute over local conditions. Neither of the cases involved completed products brought to the place of use through interstate commerce and there dis-

criminated against in order to maintain a monopoly market for products locally manufactured. In neither case was a privileged group of employers given exclusive market opportunities as against all others and competition destroyed to maintain the monopoly.

Cf.:

Levering & Garrigues Co. v. Morrin, 289 U. S. 103;
United Leather Workers v. *Herkert & Meisel*, 265 U. S. 457;
U. M. W. v. *Coronado Coal Co.*, 259 U. S. 344.

12. If, in the case at bar, it appeared that Local 3 was merely at loggerheads with the contractors over the use of some modern equipment or efficiency plan which reduced working hours, or over the number of electricians to be employed per unit of installation, the situation would be like that presented in the musicians and hod carriers cases. But the facts in the case at bar are otherwise. The contractors, far from having a labor dispute over the matters involved in this case, are working in harmony with the union in respect thereto and, on a basis of mutual advantage, are seeking a larger income for all by monopolizing all dealings and diverting patronage to local sources. The restraint grows out of cooperation between employer and employee and not out of dispute. Unless the contractors cooperate, whether willingly or unwillingly, the boycott cannot proceed. The union power merely serves to hold them to their commitment.

13. The agreement between labor, distributors, installers and producers that certain lines of merchandise will not be carried or offered to the public deprives the public of its sovereign right of choice or its right of commercial suffrage. It operates as an undemocratic boycott, clearly distinguishable from labor's appeal to the consumer that patronage be diverted to support labor objectives. The

public is entitled to the opportunity to buy articles which manufacturers, merchants and journeymen seek to have placed before them, and combinations of labor and non-labor groups to prevent this are against the public interests within the meaning of our anti-trust laws.

14. In attempting to apply the words "labor dispute," as used in the Norris-LaGuardia Act, it must be remembered that the public policy declared in the statute relates to collective bargaining and that under Sec. 107 the requisites for an injunction call for a showing of comparative injury as between the parties to the action, as well as an effort on the part of the plaintiff to negotiate, mediate and arbitrate the issues. *Brotherhood of R. R. Trainmen* v. *Toledo, etc. R. R.*, 321 U. S. 50. In the light of these provisions it becomes clear that the words "labor dispute" can have no application to a situation, such as arises in the instant case, where there is nothing that the parties can negotiate, mediate or arbitrate and where the doctrine of comparative injury can have no rational application.

II

Further Comments on the Opinion of the Court of Appeals.

The Court of Appeals commented upon the fact that none of the conspiring employers was made a party defendant, but this is immaterial, since defendants are bound by the acts and declarations of conspirators who are not parties to the suit (*Clune* v. *U. S.*, 159 U. S. 590; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229), and a party is free to sue only part of the conspirators and, in fact, may choose those who had no direct contact with the immediate transaction which injured the plaintiffs (*Atlanta* v. *Chattanooga*, 127 Fed. 23 (C. C. A.); 203 U. S. 390). In fact, it is common practice for the Department of Justice to name conspirators in an anti-trust indictment who are not named as defendants.

In a case of this character it was reasonable and practicable to select the union conspirators, as they represented the keystone to the arch or, to change the simile, the cement which compelled adherence to artificial and costly restrictions by hundreds of contractors and many manufacturers. The theory of the action was to remove this police force and re-establish individual freedom of action on the part of buyers.

The Court of Appeals criticized the breadth of the injunction but it is obvious that such discussion does not suport a dismissal of the action. Moreover, on this point it must not be forgotten that the reason for the illegality of the combination is fundamental. It lies in the objective of isolating a particular locality in order to monopolize the market in that locality. All steps, however innocent or constitutionally protected, taken to further that end, are steps in the plot (*Aikens* v. *Wisconsin*, 195 U. S. 194) and enjoinable (*Gompers* v. *Bucks Stove & Range Company*, 221 U. S. 418; *U. S.* v. *Reading*, 226 U. S. 324). That is all this injunction undertakes. According to settled rules of construction it cannot be applied to combinations different in character from that which constituted the subject matter of the action. Of course, these defendants are still free, so far as the injunction is concerned, to induce people to refuse to buy or handle products in furtherance of some different purpose, but once the illegality of the combination is determined, the relief should be complete and effective, to the same degree as injunctions against business organizations. To use the terminology of the Labor Relations Boards, there should be disestablishment of the illegal combination so far as it affects plaintiffs. After the law on this subject is determined it might be practicable to insert in the decree and the injunction some added description as to the nature of the combination but it would not affect the scope.

The defendants' contention that they should be enjoined only from prosecuting this combination in conjunction with

non-labor groups (pp. 172-3) misses the point. It is the pursuit of the non-labor objective which must be halted regardless of whether the non-labor groups continue to cooperate.

The Court of Appeals points out, in respect to the importance of the non-labor group, that there was necessarily "a real change in emphasis as the case progressed", "because of the complete reversal of the controlling judicial precedents during the long pendency of this litigation." In this connection it refers to the original complaint in 1935 and the "expanded, amended complaint in 1937." This comment does not strike us as important, but it is certainly misleading when it is recalled that the *Apex* case was decided in 1940 and the *Hutcheson* case in 1941, three and four years respectively after the filing of the amended complaint.

The Court answers the plaintiffs' claim in respect to the alliance with non-labor groups, first by assuming that the unions could accomplish the same anti-social result without such an alliance—an assumption not warranted in the field of human relations and economic organization,—and second, by concluding that crucial sentences in the *Hutcheson* case "should not be read with exacting literalness." We respectfully submit that a reading of the pertinent decisions of the Supreme Court supports the conclusion that labor alliances with non-labor groups for non-labor objectives are not exempted as labor combinations from the anti-trust laws and that on this point the brief but clear and definite decision of the District Court in this case is in marked contrast with the elaborate discourse of the Court of Appeals.

When labor enters into collusive arrangements with employers to use its joint powers to milk the public, a menace is created which is more dangerous to public interests than when labor acts alone and the economic relationships at issue are then between producer and consumer and not between employer and employee.

It is admitted, as the Court of Appeals asserts, that the union was acting in its own self-interest, as well as in the interest of the non-labor groups. Self-interest is the dynamic force behind practically all monopolies and restraints of trade. It is undeniable, however, that a combination with an unlawful purpose is not saved by the fact that it also has a lawful purpose. A strike which includes two objectives,—one lawful and one unlawful,—is an unlawful strike. (*Folsom Engraving Company* v. *McNeil*, 235 Mass. 269.) Nor is it true, as the Court of Appeals suggests, that an unlawful combination should be left untouched because the same result could be accomplished in a lawful way. It is not unusual to find a situation where a lawful object may be accomplished by either a lawful or unlawful means but that fact does not justify resort to the unlawful means.

The Court of Appeals, while commenting on these speculative factors, which heretofore have never been weighted in cases of this character, entirely ignores the argument that this case presents a naked attempt to promote economic sectionalism contrary to the fundamental purpose for which Congress was given control over national commerce.

Conclusion

The plaintiffs urge that the defendants' combination as set forth in the findings is in violation of the anti-trust laws and should be enjoined and that the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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